IN THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LAMB WESTON, INC.	)	
	)	
Respondent,	)	Case No. 15-CA-207924
And	)	
	)	
AMANDA DEXTER,	)	
An individual	)	
	)	
Charging Party.	)	
	)	

RESPONDENT'S REPLY BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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RESPONDENT'S POST-HEARING REPLY BRIEF

Respondent Lamb Weston, Inc. ("Respondent," "Lamb Weston" or the "Employer"), by and through the undersigned counsel, and pursuant to §102.42 of the Board's Rules and Regulations, as amended, hereby timely files its reply brief.

I. PRELIMINARY STATEMENT AND OVERVIEW

Counsel for the General Counsel's post-hearing brief argues the case as if the National Labor Relations Board had never decided *The Boeing Co. Inc.*, 365 NLRB No. 154 (Dec. 14, 2017) and as if the General Counsel himself had not issued *Memorandum GC 18-02* (December 1, 2017). Counsel for the General Counsel seeks to continue the strained interpretations of work rules that preceded *Boeing*, cherry picking words out of context in regard to one work rule and entirely omitting words from the rule they challenge in another, all in a speculative effort to allege fault with basic and fundamental work rules.

Boeing ended the "construe against the drafter" crutch of analysis applied in the past. "Regions should now note that ambiguities in rules are no longer interpreted against the drafter…" General Counsel Memorandum, at 1 citing *Boeing*, slip op. at 9, n. 43. Yet, on pages 11 and 22, Counsel for the General Counsel urges the ALJ to construe allegedly ambiguous language in some of the work rules against Lamb Weston.

Boeing also clearly ended the speculative, "could have been" type of interpretation of work rules, stretching them beyond reason to find an arguable conflict with Section 7. "[G]eneralized provisions [in work rules] should not be interpreted as banning all activity that could conceivably be included [within their scope]." General Counsel Memorandum 18-04, p. 1. Facially neutral work rules now should be subject to challenge *only* where the work rule *would* be interpreted by an objectively reasonable employee, who is "aware

of his legal rights but who also interprets work rules as they apply to the everydayness of his job…" *Boeing*, slip op. at 3, n. 14. Yet, Counsel for the General Counsel flies in the face of *Boeing* when arguing, on pages 11, 21 and 25, that work rules which "could" or even "might" be read to interfere with protected conduct violates the NLRA.

Counsel for the General Counsel also failed, when analyzing the remaining work rules, to apply properly the balancing test required by *Boeing* to give respect to the fundamental interests of employers and cites cases that predate *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) and *Boeing* as authority on the ultimate issue of the lawfulness of a particular type of rule. At most, those cases can reliably stand only for the proposition that, when applying the balancing test commanded by *Boeing,* the contested type of rule has been shown to have a potential impact on Section 7 rights. *Nicholson Terminal and Dock Co.*, 07-CA-187907, 2018 BL 173681, n. 11 (May 16, 2018). *Boeing* is the law and must be respected.[1]

II. Counsel for the General Counsel Blatantly Misreads Lamb Weston's Problem Resolution Procedure.

Counsel for the General Counsel concedes that a problem resolution process that does not mandate its use is lawful. Only where a dispute or problem resolution process restricts employees from taking a complaint to others, *Guardsmark v. NLRB*, 475 F.3d 369, 376 (D.C. Cir. 2007) , or where use of it is mandated under penalty of discipline, with the implication that an employee could not raise the complaint elsewhere, *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990), that such a process could be found unlawful.[2]

[1] It also must be remembered that the General Counsel bears the ultimate burden of proof at all times, as was stated and supported in Lamb Weston's post-hearing brief.

[2] The Court in *Hyundai American Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 315 (D.C. Cir. 2015) summarized this analytical framework very clearly. Where an employer's complaint or dispute resolution process neither prevents employees from taking work-related complaints to others than the employer or

Lamb Weston's Problem Resolution Procedure ("PRP") is not mandatory. Lamb Weston, "believes that any employee having a complaint or question *should have the opportunity to discuss it with management.*" (Joint Exhibit 2, at 31). Lamb Weston "strongly encourage[s] employees with questions to use" the PRP. (Id.) Employees "having a question or issue … *should* follow these procedures." (Id. at 31, Section 9.1). No reasonable employee would construe the PRP to preclude him or her from raising issues outside the process. Indeed, this proceeding began by such a circumstance.

While ignoring the permissive introductory language to the PRP, Counsel for the General Counsel cherry-picks one word to bootstrap a fantastical argument that the PRP is mandated. The PRP has a detailed process to facilitate an early and direct resolution. "[B]ecause we strongly believe that it is best to get questions, concerns and problems resolved as quickly as possible…", the PRP "ask[s]" employees to raise their concerns promptly." (Jt. Ex. 2, p. 31, Section 9.1, STEP 2). In one section of the description of how the process works, the PRP states that, in order for a problem to be timely-raised, it "must" be discussed within seven days of it having arisen. (Jt. Ex. 2, p. 31, STEP 1).

The word "must," as used in Step 1 of the PRP plainly has the opposite effect from being in any way mandatory. At most, this timeliness provision informs an employee that a concern not raised within seven days cannot be raised within the PRP. The word "must" limits the PRP's scope. Ignoring the permissive language at the introduction of the PRP, Counsel for the General Counsel then twists a single word that clearly places a time limit on when issues can be raised to claim magically that this one word somehow mandates

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mandates on penalty of discipline that an employee bring any complaint to the employer, it was lawful, even pre-*Boeing*.

that an employee use it. Not even an unreasonable employee would read the PRP in the manner asserted by Counsel for the General Counsel.

Continuing to strain to sustain his claim, Counsel for the General Counsel fails to describe fully the NLRB's holding in *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990), stating that the Board invalidated a work rule that "did not on its face" prohibit an employee from raising a concern to another, but he fails to give the rest of the story. Initially, the ALJ in *Kinder-Care* held unlawful one portion of a Parent Communication Rule in Kinder-Care's Employee Handbook because it expressly prohibited an employee from discussing work concerns with parents but found another portion of the rule lawful because it did not expressly prohibit an employee from discussing concerns with others. Id. at 1179-83. On appeal, the General Counsel challenged the ALJ's finding on the second portion of the Parent Communication Rule. The Board held:

> Although the rule does not on its face prohibit employees from approaching someone other than the Respondent concerning work-related complaints, *it provides that employees first report such complaints to the Respondent "immediately or use the company problem solving procedure" and that it is "essential" for the employees to do so. Furthermore, the rule provides that the failure of employees to abide by this policy may result in discipline, including discharge.*

Id. at 1172 (emphasis added). Nowhere does Lamb Weston's PRP mandate its use through discipline. This part of the Amended Complaint must be dismissed.

III. Counsel for the General Counsel Ignores the Clear Guidance of General Counsel Memorandum 18-04 When Attacking Work Rule 11.

Work rule 11 is a very common type of rule. Such rules are ubiquitous. "Almost every employer with a rulebook has a rule forbidding insubordination, unlawful or improper conduct, uncooperative behavior, refusal to comply with orders or perform work, or other on-the-job conduct that adversely affects the employer's operation." General

Counsel Memorandum 18-04, p. 6. Section Category 1-C of that memorandum categorizes a rule like this as a category 1 rule and expressly approves of the lawfulness of a very similar work rule: "Being uncooperative with supervisors … or otherwise engaging in conduct that does not support the [Employer's] goals and objectives." *Id. citing Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Nonetheless, Counsel for the General Counsel ignores this guidance, twists Lamb Weston's rule intended inoffensively to protect its operations,[3] and argues that the rule is unlawful because it "might" be interpreted to apply to Section 7 activities like a strike.

> First, work rule 11 is plainly a category 1 rule:[4]
>
> The vast majority of activity covered by these rules is unprotected, and employees would not usually understand such rules as covering protected concerted activity. Indeed, even prior to Boeing, the Board has always been careful to note that employees would not, without more, read rules against improper or unlawful conduct as applying to Section 7 activity.[5]

General Counsel Memorandum 18-04, at 7 (footnotes omitted). Even if the rule were reasonably understood to include protected activity, it would not impede it:

> *Impact on NLRA Rights*: The majority of conduct covered by this type of rule is unprotected roughhousing, dangerous conduct, or bad behavior. ... On the other hand, some such rules might, depending on the context, appear to apply to classic core protected concerted activity …, since these activities are often considered disorderly or disruptive. Indeed, such activity is often engaged in *because* it is disruptive – in order to draw attention, underline seriousness, or be used as an economic weapon. *Nevertheless, even if employees would read such rules as applying to strikes and walkouts …, employees would not generally refrain from such activity merely because a rule bans disruptive conduct. Rule or no, in these circumstances, employees know that they are discomfiting their employer and are acting anyway.*

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[3] The "words or other conduct" made subject to work rule 11 plainly means that which is similar to, or of the same kind as, the two preceding words in the listing. This is a basic, fundamental interpretive rule. *Community Hospitals v. NLRB*, 335 F.3d 1079, 1088-89 (D.C. Cir. 2003).

[4] Counsel for the General Counsel fails to offer any analytical support for his suggestion that this is category 3 rule.

[5] This portion of General Counsel Memorandum 18-04 also supports the lawfulness of work rule 36. *See also Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) and *Albertson's, Inc*., 351 NLRB 254, 259 (2007).

General Counsel Memorandum 18-04, at page 8 (emphasis added). As Counsel for the General Counsel concedes the "strong interest in continuing its operations unimpeded." the balancing test clearly favors Lamb Weston. Id. That should end the inquiry.

Counsel for the General Counsel doubles down on this argument with a twisted reading of how *Boeing* applies to *William Beaumont Hospital*, 363 NLRB 1055 (2016). Nowhere in *William Beaumont Hospitals* was there a determination that the language in the hospital's rule prohibiting "[c]onduct on the part of a Beaumont employee … that is … detrimental to … Hospital operation" violated the Act. Id. at 1055. Indeed, the ALJ found expressly that protecting hospital operations was a "legitimate business concern."[6] Whether *William Beaumont* is fully dead or only mostly dead has no impact on this case.

IV. Work Rule 35 Is Not A "Blanket" Preclusion On Discussing Investigations.

Discretionary rules that allow an employer to protect investigative confidentiality on a case-by-case basis are lawful. *Banner Health Sys*., 362 NLRB No. 137 (2015). Rules that impose blanket or categorical confidentiality rules applying to all investigations have been found to be unlawful. *Banner Health Sys. v. NLRB*, 851 F.3d 35 (D.C. Cir. 2017); *Hyundai American Shipping Agency, Inc. v. NLRB*, 805 F.3d 309 (D.C. Cir. 2015). Where the Board has "made unwarranted logical leaps that the evidence cannot fairly support…" when alleging a rule to be a blanket prohibition, it has been reversed. *Banner Health Sys*., 851 F.3d at 43.

The rule's actual text shows it is not categorical, allowing employees to discuss an investigation where *"specifically authorized to do so*." (Jt. Ex. 2, page 29) (emphasis

[6] The Board found unlawful two specific portions of the introductory paragraph which contains the protection of operations language. *Id*. at 1055.

added). The rule plainly provides for discretion for the employer to decide on a case-by-case basis whether to require confidentiality. Counsel for the General Counsel's argument is really about how he fears the rule "might be" applied.

V. The Remainder of Counsel for the General Counsel's Arguments Likewise Are Not Consistent with *Boeing*.

a. Distribution Rule

Counsel for the General Counsel first focuses myopically on the word "inflammatory", not considering the context in which the word is used, to claim that it is "without any clarification" and thus is ambiguous and overbroad. Its context, "[c]ertain types of material -- obscene, profane *or inflammatory*," is obviously clarifying. "Although [Lamb Weston's] employees are perhaps unlikely to know the term *ejusdem generis*, they no doubt grasp as well as anyone the concept it encapsulates." *Community Hospitals v. NLRB*, 335 F.3d 1079, 1088-89 (DC Cir. 2003). A reasonable employee would understand that "inflammatory" is that is "of a piece with" obscene or profane material. *Id*.

Counsel for the General Counsel's second deviation from *Boeing*'s teachings arises when he argues that, because some political materials may relate to protected activity, Lamb Weston's distribution rule is "unlawful on its face". Counsel for the General Counsel's crashes head first into *Boeing. Boeing* directly acknowledges that some work rules that interfere on their outer bounds with some types of protected activity nonetheless will be lawful: "Some of the rules in this category [two] clearly would be read to preclude some Section 7 activity, and the key question then is whether the employer's particular business interest in having the rule outweighs the impact on Section 7 rights." General Counsel Memorandum 18-04, at 16. In evaluating rules of this type, "evidence that a rule has actually caused employees to refrain from Section 7 activity is a useful interpretive

tool." *Id.* Here, Downard testified that the work rule is intended to protect against the divisiveness of politics from infecting the Delhi workplace. (Tr. 45, 24-25). In this age where our politics is likely as divisive and vitriolic as it has ever been and when a workplace of elementary school teachers makes national news from highly politicized and racially-charged Halloween costumes,[7] one would have to be an ostrich not to see that a rule of this nature has prophylactic and legally-compliant benefits. Downard testified that the Delhi plant has had a union and that union leaflets and materials have been distributed without any penalty – in other words, employees fully understand that this rule does not limit their Section 7 activity. (Tr. 46). The distribution rule is lawful under *Boeing*.

b. Employee Agreement

With regard to the Employee Agreement, Counsel for the General Counsel once again fails to look at the context of the document. Both its plain terms and the testimony about it make its limited scope abundantly clear. It is intended to be executed by and apply to only those Lamb Weston employees to whom Lamb Weston's confidential and proprietary information, of whatever type, is entrusted. To some of those employees Lamb Weston's confidential human resources information is entrusted. So, the Employee Agreement expressly calls out the need to protect its confidential information in its "human resources information systems." It is entirely legitimate, if not expected by law, for Lamb Weston to require those employees to protect the confidentiality of that information.

At Delhi, through confusion and error, some employees who were not intended by the Company to sign the Employee Agreement were, in fact, asked to sign. While Dexter should not have been asked to sign the Employee Agreement, it was not unlawful for that

[7] https://www.washingtonpost.com/nation/2018/11/03/these-school-teachers-dressed-up-mexicans-wall-halloween-it-didnt-go-well/?utm_term=.1610c5c571aa .

to have occurred. As she possessed no Lamb Weston confidential information, the Employee Agreement had no affect on her. She was not required to keep confidential that which was not entrusted to her and thus did not possess. The Employee Agreement, when understood in its obvious category 2 context, is patently lawful.

VI. Conclusion and Request For Dismissal of Allegations

For the reasons stated in Lamb Weston's post-hearing brief and this reply brief, Lamb Weston respectfully submits that the Amended Complaint be entirely dismissed.

Respectfully submitted this this 9th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2018, a true and correct copy of the foregoing **RESPONDENT'S REPLY BRIEF TO THE ADMINISTRATIVE LAW JUDGE** was filed using the National Labor Relations Board on-line E-filing system on the Agency's website and copies of the aforementioned were therefore served upon the following parties via electronic mail as follows:

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